IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 332 OF 1991

1. Parubai Savliram Kshatriya
since deceased through her
legal heir:

1.A. Anusayabai Ganpat Bakale
45, Occ. Household,
Resident of Sinnar .. Appellant
(Org. Plff.)

Vs.

1. Shankar Ganusa Kshatriya
since deceased through his legal
heirs:

1.A. Ashok Shankar Kshatriya
32, Occ. Business, R/o Sinnar

1.B. Gangubai Shankar Kshatriya
55, Occ. Household R/o Sinnar

1.C. Vimal Maniksa Kshatriya
45, Occ. Household, R/o Sinnar

1.D. Nandubai w/o Shravan Kshatriya
42, Occ. Household, R/o. Sinnar

1.E. Rukminibai Subhash Pasar
25, Occ. Household, R/o Sinnar

2. Ashok Shankar Kshatriya
32, Occ. Business, R/o Sinnar

3. Shantaram Damu Gaikwad
42, Occ. Service.

4. Vasant Madhav Kshatriya
42, Occ. Business.

5. Dhondiram Sitaram Kshatriya
42, Resident of Sinnar
All Respdts. R/o Sinnar,
Tal. & Dist. Nasik.

Mr. Pramod N. Joshi for appellant.
Mr. C.S. Joshi for Respondent Nos.1A to 1C and 1E.
Respondent Nos.2,3,4 are served (absent).
Appeal dismissed as against Respondent No.1D and Respondent No.5 vide Addl. Registrar's order dated 22/10/1993.

WITH
SECOND APPEAL NO. 416 OF 1991

1. Shri Shankar Ganusa Kshatriya
60, Occ. Weaver, resident of
Sinnar, since deceased by his
heirs.

1A. Ashok Shankar Kshatriya
39 years, Occ. Business,
resident of Sinnar.

1B. Gangubai Shankar Kshatriya
aged 62 years, Occupation-
household, resident of Sinnar.

1C. Vimal alias Kamal Maniksa
Kshatriya, 52 years, household,
resident of Sinnar.

1D. Nandubai w/f Shravan Kshatriya
49 years, Occ. Household,
resident of Sinnar-Deceased.

1E. Rukminibai Subhash Pawar
32 years, Occ. Household,
resident of Sinnar.

2. Ashok Shankar Kshatriya
39 years, Occ. Business,
resident of Sinnar. .. Appellants
(Org. Defts.
Nos.1 & 2)

Vs.

1. Parubai Savliram Kshatriya
age 60 years, Occu.Household,
resident of Sinnar, since
deceased by her heirs.

1A. Anusayabai Ganpat Bakale
52 years, Occ. Household,
resident of Sinnar.

2. Shantaram Damu Gaikwad
59 years, Occ. Service.

3. Vasant Madhav Kshatriya
49 years, Occ. Business.

4. Dhondiram Sitaram Kshatriya
61 years, resident of Sinnar,
Dist. Nasik.
(Left the suit property) ..Respondents
(No.1 Org. Plff.
Nos.2,3,4 Org.
deft.Nos.3,4,5)

Mr. C.S. Joshi for appellants.
Mr. Pramod N. Joshi for Respondent No.1A.
Names of Respondent No.2 and 3 are deleted as per order dated 8/6/2004.

CORAM: B.H. MARLAPALLE, J.

Date : December 22, 2005.

ORAL JUDGMENT:

1. Second Appeal No. 332 of 1991 has been filed by the plaintiff being aggrieved by the decree passed by the Lower Appellate Court in Regular Civil Appeal No.164 of 1984 whereby the decree passed by the learned Civil Judge, Junior Division at Sinnar in

Regular Civil Suit No.101 of 1972 came to be modified. Second Appeal No. 416 of 1991 has been filed by the original defendants being aggrieved by the decree passed by the learned Civil Judge, Junior Division, Sinnar in Regular Civil Suit No.101 of 1972 as well as the Judgment and Order of the Extra Joint District Judge, Nashik in Regular Civil Appeal No.164 of 1984. In Second Appeal No.332 of 1991 the following substantial questions of law have been framed while admitting it on 18/7/1991 by this Court:

> (a) Whether the lower appellate court was justified in construing the provisions of Section 23 of the Hindu Succession Act, 1956 by granting decree of partition and possession only in respect of the rented portion of dwelling house and denying the claim in respect of the portion in which the members of the joint family are residing?
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> (b) Whether the lower appellate court was justified in over looking the ratio of the judgment reported in AIR 1988, Calcutta, page 115 whereby it has been clearly held that if

the portion of the dwelling house is partly rented, the entire property is taken away from the exceptions of Section 23 as it is not wholly occupied by the joint family members?

(c) Whether the lower appellate court was right in over looking the fact that as the entire dwelling house is not occupied by the joint family members, it is open for the female members to claim partition in the entire dwelling house and that it will be only at the stage of executing the decree while considering the equities, the portion which is occupied by the tenants can be divided in such manner so that the parties get share equitably?

1A. In Second Appeal No.416 of 1991 while admitting it on 22/8/1991 the following substantial question of law has been framed by this court:

"Whether the provisions of Section 23 of the Hindu Succession Act, 1956 could have a

retrospective application in respect of the death of Savaliram who died in 1946 and who was governed by the Mitakshra School of Law, so also the question of misappreciation of evidence as to previous partition?

2. The trial court's decree in Regular Civil Suit No.101 of 1972 declared that the plaintiff and defendant no.1 Shankar had half share each in the suit property described in para 2 of the plaint and she would also have half share in the past income of the property for the last three years prior to the date of the filing of the suit. She was held to be entitled to recover an amount of Rs.1260/- from the defendant no.1 and also for mesne profit for future.

2A. The Lower Appellate Court while agreeing with the findings recorded by the trial court that the plaintiff and defendant no.1 were entitled for half share each in the suit property held that the portion of the house occupied by the defendant could not be partitioned in view of the provisions of Section 23 of the Hindu Succession Act, 1956 and for the time being the decree passed by the trial court was required to

be executed only in respect of the portion of the suit house occupied by the tenants, by keeping in abeyance the plaintiff's half share over the portion occupied by the defendant for his residential dwelling, till there was a partition of the same between the male members. The substantial questions of law framed in Second Appeal No.332 of 1991 pertain to only this modification made in the trial court's decree by the Lower Appellate Court. Whereas the defendants' appeal has raised the questions regarding the applicability of the Hindu Succession Act and appreciation of evidence by the trial court regarding the suit house being the property of defendant no.1 alone. Let it be noted at this stage itself that the substantial questions of law framed in Second Appeal No. 332 of 1991 do not survive any further and the reasons could be stated in short in the following paragraph.

3. Regular Civil Suit No.101 of 1972 came to be filed by Smt. Parubai, the widow of Savaliram Kshatriya praying for partition and possession of half share of the suit property, namely, Sinnar Municipal House No.42 and C.S. No.559/560. She had claimed

that it was a joint property of her husband Savaliram and his brother Shankar who were the sons of Gansua Kshatriya and Savaliram was the elder brother and Shankar was the younger brother. As per her, the suit house was purchased by her father-in-law Gansua vide sale deed dated 12/8/1918 (Exh.54). Her father-in-law died on 26/10/1928 and thereafter as well she was staying in the suit house along with her husband and his brother Shankar and the other family members. Her husband Savaliram died on 1/2/1946 while residing in the suit house and thereafter she continued to stay as a joint family member along with defendant no.1 and his children. Her only daughter Anusaya was married in 1942 at Sinnar only. After about more than 15 years she stayed as a joint family member, the defendant no.1 forced her to stay in a separate room in the suit house and the original defendant nos.3 to 5 were kept as tenants in part of the suit house. The defendant no.1 was collecting rent from them and was also spending on the joint family's requirements. However, when she started staying separately in the room which was part of the suit house, the defendant no.1 refused to give her part of the income arising out of the rent and, therefore, she issued legal

notice dated 15/7/1971. The defendant no.1 replied to the same and denied her claim. She, therefore, filed Regular Civil Suit No.101 of 1972. When the parties approached this court, all the tenants had vacated the respective premises occupied by them from the suit property and, therefore, no portion of the suit house has been in occupation of any tenants while these Second Appeals are pending before this court.

3A. The second substantial question of law based on the decision of the Calcutta High Court in the case of Smt. Usha Majumdar and ors. vs. Smt. Smriti Basu (Supra) is deemed to have been answered in the case of Narashimaha Murthy vs. Smt. Susheelabai and ors. reported in **AIR 1996 SC 1826** and, therefore, the said issue does not survive any futher.

3B. Second 23 of the Hindu Succession Act, 1956 reads as under:-

> "23. **Special provision respecting dwelling-houses.** - Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the

Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, they, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

. Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

. In the Schedule to the Act, Class I heirs have been defined as;

"Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of

a pre-deceased son; son of a pre-deceased son; widow of a pre-deceased son of a predeceased son."

4. In the instant case Smt. Parubai was the plaintiff and she became a widow in February 1946 whereas her father-in-law Gansua died in the year 1928 itself and hence she was not a widow of the pre-deceased son. She did not fall in any of the Class-I heirs mentioned in the Schedule to the Act and, therefore, the provisions of Section 23 of the said Act were not applicable to the suit filed by her. The learned Judge of the Lower Appellate Court fell in manifest error in applying the special provision under Section 23 and modifying the decree. However, this modification has now become redundant as there is no tenant in any part of the suit house, as at present.

5. Let us now examine the substantial question of law framed in Second Appeal No.416 of 1991. It was submitted by Mr.C.S. Joshi the learned counsel for the defendants that the trial court was in error in appreciating the evidence of the D.W.1 Shankar and D.W.2 Gopal Gangavane. As per the defendant Shankar,

his elder brother Savaliram had separated from the father sometimes in the year 1908 and the suit house was purchased after about 10 years from this separation by their father Gansua. Savaliram had thus severed from the joint family in the year 1908 and, therefore, he had no right on the suit house purchased by the father in the year 1918. The defendant no.1 claimed to be the exclusive owner of the suit house on the demise of his father in 1928 and he contended that at no point of time either his brother Savaliram or his widow, the plaintiff, had been a member of his joint family. He further stated that Savaliram was the tenant of Gopal Gangavane and he continued to stay in such tenanted premises till his death and at no point of time till the suit was filed the plaintiff had stayed as a member of the defendants' joint family. Except his bald statement sought to be supported by the evidence of D.W.2 Gopal Gangavane, there was no documentary evidence in support of these contentions. When the defendant no.1 had taken a specific stand to defeat the claim of the plaintiff, namely, that the suit property was under his exclusive ownership and it was not a joint Hindu family property along with the plaintiff, the onus squarely fell on

him to prove the same and he, therefore, examined himself and D.W.2 Gopal Gangavane. The trial court discarded the testimony of Gopal Gangavane and rightly so. While under cross-examination this Gopal stated before the trial court that his house number was 44 and before its reconstruction from 1936 to 1940 it had only one floor with an attic and it admeasured in length 30 to 40 ft. with a width 15 ft. There were in all 10 members in his family and all of them were staying in the same house. There were four rooms and in the attic there were three rooms. As against this he further stated in the cross-examination that the entire house was given to Savaliram on rent. Even if his testimony is accepted, Savaliram occupied his house only from 1910 to 1924 and not thereafter at any time. As noted earlier, Gansua, the father-in-law of the plaintiff died in 1928. On behalf of the plaintiff Ganpat Bakale (P.W.1) was examined. He is the husband of Anusayabai, the daughter of the original plaintiff and who came to be impleaded in place of her mother. It is pertinent to note that the sale deed of the suit house was in possession of the plaintiff and it was brought on record by P.W.1 while in the witness box. This itself is sufficient to

dismiss the claim of the defendant no.1 that the suit house was his exclusive property and if it was so the sale deed would not remain in the custody of the plaintiff. Ganpat stated on oath that he was married to Anusaya in the year 1942 while his in-laws staying as joint family members with defendant no.1 in the suit house and after about four years of his marriage Savaliram, the father-in-law died. Ganpat is a resident of Sinnar itself and he had personal knowledge about the claim made by the plaintiff. He stated that after the demise of his father-in-law, the mother-in-law continued to stay as the family member of the defenants' family for about 16 to 17 years and thereafter she continued to stay separately in an independent room located in the suit house. As per this witness even after Parubai started staying independently, the defendant no.1 was looking after her for some time and thereafter he refused to do so, as a result of which Parubai started working as a labourer. No documentary evidence was placed on record by Shankar to support his claim that his brother Savaliram and the plaintiff ever stayed in the suit house.

6. Savaliram died in February 1946 i.e. prior to the enactment of the Hindu Succession Act, 1956. Second 3 of the Hindu Women's Rights to Property Act, 1937 governs the right of property of the widow where a Hindu died intestate leaving behind her. Sub Section (2) of Section 3 of the said Act states that when a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had. Whereas Sub-Section (3) states that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner. On the demise of Savaliram the plaintiff's right to the suit house was governed under Section 3 of the Hindu Women's Rights to Property Act, 1937. As per the plaintiff she continued to stay as a joint family member of the defendant no.1 for over 16 years after the demise of her husband and by then the Hindu Succession Act was in force and, therefore, there was

no question of the retrospective applicability of the said Act to her claim. The cause of action as stated in the plaint arose in the year 1971 or about three years prior thereto when the defendant no.1 refused to give her share from the rental income.

7. Thus, on both the counts, namely, on appreciation of evidence in support of the claim made by the defendant no.1 of exclusive ownership over the suit house as well as on the applicability of the Hindu Succession Act, 1956, the reasoning given by the trial court does not suffer from any errors and the Lower Appellate Court confirmed these findings of the trial court regarding the plaintiff's half share in the suit house in the following words:-

> "Here in this case, the lower court has rightly found out that the suit house was joint family property of Gansua which was inherited by Savaliram and Shanakr after the death of Ganusa. Thereafter Savaliram and Shankar continued as the members of the joint family and holding the suit house as a joint family property. Even on the date of the

filing of the suit, the suit house was occupied by defendants Shankar and Ashok"

8. In para 19 of its judgment, the Lower Appellate court upheld plaintiff-Anusayabai's right to claim her half share in the suit house but proceeded to note that the same was required to be kept in abeyance in respect of the portion occupied by Ashok and it could be exercised in respect of the tenanted portion for partition. As noted earlier, there are no reasons existing any more for delaying or keeping in abeyance the plaintiff's right to partition and possession of half share of the suit house. The substantial questions of law framed in the appeal of the defendants thus stand answered against the defendants.

9. In the premises, Second Appeal No. 332 of 1991 is disposed as infructuous and Second Appeal No.416 of 1991 is dismissed with costs.

10. At this stage Mr. C.S. Joshi the learned counsel for the defendants made an oral application for continuing the stay order for a period of six weeks. The learned counsel for the plaintiff has

opposed the said prayer. On the face of the concurrent findings recorded by both the courts below there is no reason to delay any further the execution of the trial court's decree. However, the defendants' oral application is allowed by continuing the status quo for a period of four weeks subject to the condition that the mesne profit as directed by the trial court and payable from the date of the decree passed by the said court is deposited with the Registry of this Court within a period of one week from today.

11. Certified copy is expedited.

(B.H. Marlapalle,J.)